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Supreme Court, U.S.
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No. 95-2065

In the Supreme Court of the United States

OCTOBER TERM, 1995

PAO YANG, ET AL., PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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30 pp

QUESTION PRESENTED

Section 208(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1158(a), provides that an alien "may be granted asylum in the discretion of the Attorney General" if the Attorney General determines that the alien is a refugee. In a regulation, 8 C.F.R. 208.14(d)(2), the Attorney General has provided that an alien shall be denied asylum if the alien has been "firmly resettled" in a third country. The question presented is whether that regulation is an abuse of the Attorney General's discretion under the INA or contrary to law.

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PAO YANG, ET AL., PETITIONERS

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IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 79 F.3d 932. The opinion of the Board of Immigration Appeals (App., *infra*, 1a-3a) is unreported. The oral decision of the immigration judge (App., *infra*, 4a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1996. The petition for a writ of certiorari was filed on June 24, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are a family of a husband, wife, and four minor children, all of whom are citizens of Laos

(although the children were born in France). Petitioners are members of the Hmong ethnic group, and they claim that members of their family assisted the United States during the Vietnam War. The parents fled from Laos to Thailand after a Communist regime came to power in 1975. After three years in Thai refugee camps, the parents were offered, and accepted, refuge in France. They remained there for 14 years. Pet. App. 1a-2a.

In 1991, petitioners entered the United States on nonimmigrant visas. After they overstayed their visas, the Immigration and Naturalization Service (INS) commenced deportation proceedings. Petitioners conceded deportability but applied for asylum and withholding of deportation. The immigration judge (IJ) denied the applications for asylum on the basis of (what is now) 8 C.F.R. 208.14(d)(2),* which provides that "[a]n application for asylum shall be denied if * * * [t]he applicant has been firmly resettled" in a country other than his or her country of nationality. The IJ noted that petitioners had conceded that they had in fact been "firmly resettled" in France, as that phrase is used in the regulation. App., *infra*, 3a. The IJ did, however, grant withholding of deportation to Laos. *Id.* at 8a. Accordingly, petitioners are subject to deportation to France. *Id.* at 9a. The Board of Immigration Appeals summarily dismissed petitioners' appeal. *Id.* at 3a.

2. The court of appeals affirmed. Pet. App. 1a-15a. The court rejected petitioners' contention that the regulation barring asylum to applicants who have been firmly resettled in a third country is an imper-

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* That Section was previously designated as 8 C.F.R. 208.14(c)(2) (1994).

missible exercise of the Attorney General's discretion to grant or deny asylum under the INA.

Applying the analysis set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court first considered "whether Congress has directly spoken to the precise question at issue." Pet. App. 6a. The court noted that the language of the relevant provision governing asylum, Section 208 of the INA (8 U.S.C. 1158), "is silent as to firm resettlement. * * * [I]t simply grants the Attorney General 'discretion' to grant asylum to eligible aliens." Pet. App. 6a. And the court concluded that, in exercising that discretion, the Attorney General was entitled to rely on rulemaking to resolve issues of general applicability (such as the "firmly resettled" issue) rather than to resolve such issues anew in each individual case. *Id.* at 7a-8a.

The court also rejected petitioners' argument that Section 208, when read together with Sections 207 and 209 of the INA, manifests a specific congressional intent that even refugees who have been firmly resettled in third countries should be able to obtain asylum in the United States. Pet. App. 9a-12a. The court acknowledged that Section 207(c)(1) (8 U.S.C. 1157(c)(1)), which governs the admission of refugees from outside the United States, authorizes the Attorney General to "admit any refugee who is not firmly resettled in any foreign country," whereas Section 208(a), which governs asylum for aliens physically present here, does not contain any similar language. But the court concluded that the difference in language meant simply that Congress left to the discretion of the Attorney General the question whether aliens physically present here but firmly resettled elsewhere should receive asylum:

> The plain meaning of these two sections read together is that the Attorney General *may not* admit firmly resettled refugees if they apply from abroad, but *may choose* whether to grant them asylum if they manage to apply from within the United States. Because [the regulation] represents just such a choice, it appears to be consistent with the grant of discretion described in [S]ection 208.

Pet. App. 11a.

The court also rejected petitioners' reliance on Section 209 of the INA, which provides that an alien granted asylum under Section 208 may become a permanent resident after one year of physical presence in the United States, provided that the alien "is not firmly resettled in any foreign country." 8 U.S.C. 1159(b)(5). The court acknowledged that Section 209 contemplates the possibility that an alien might be granted asylum under Section 208, even though he or she had been firmly resettled elsewhere. But, the court noted, while "Section 209 clearly allows for the *possibility* that the Attorney General might grant asylum to a firmly resettled alien * * * it does not demand that she do so. Section 209 is pointedly silent with respect to how the Attorney General should exercise her discretionary power under [S]ection 208." Pet. App. 13a.

ARGUMENT

Petitioners renew their contention that the Attorney General's regulation, 8 C.F.R. 208.14(d)(2), by precluding persons firmly resettled in third countries from being granted asylum, contravenes the INA. The decision below is correct, and it does not conflict with any decision of this Court or any

other court of appeals; further, petitioners themselves state that "this [case] is not likely to affect a lot of people." Pet. 4. Further review is therefore not warranted.

1. Section 208(a) of the INA, 8 U.S.C. 1158(a), provides that an alien physically present in the United States or at a port of entry "may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of [8 U.S.C. 1101(a)(42)(A)]." Asylum is thus a "two-part process involving a determination of statutory eligibility and a discretionary determination once eligibility is established." *Diaz-Escobar* v. *INS*, 782 F.2d 1488, 1491 (9th Cir. 1986). "[A]n alien who satisfies the applicable standard under [Section] 208(a) does not have a *right* to remain in the United States; he or she is simply *eligible* for asylum, if the Attorney General, in [her] discretion, chooses to grant it." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 443 (1987).

The INA places no express limit on how the Attorney General may exercise her discretion, and "[w]hether or not a 'refugee' is eventually granted asylum is a matter which Congress has left for the Attorney General to decide." *Cardoza-Fonseca*, 480 U.S. at 450. The INA provides only that the alien "may be granted asylum in the discretion of the Attorney General" (8 U.S.C. 1158(a)), language that has been construed as a broad delegation of power to the Attorney General. See *Komarenko* v. *INS*, 35 F.3d 432, 436 (9th Cir. 1994).

This is therefore a situation in which "Congress has explicitly left a gap for the agency to fill." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Accordingly,

the Attorney General's regulation identifying a category of aliens who will not be granted asylum as a matter of discretion must be given "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

2. Petitioners argue (Pet. 5-7) that the regulation is contrary to the INA because Section 207, unlike Section 208, *expressly* precludes the Attorney General from granting relief to aliens abroad who are firmly resettled in third countries. Since Congress did not include similar prohibitory language in Section 208, they reason, it must have intended the Attorney General to grant asylum to aliens who are covered by that Section and who otherwise warrant relief, even if they were firmly resettled elsewhere.

As the court of appeals pointed out, however, the omission of the prohibitory language in Section 208 shows only that Congress did not *prohibit* the Attorney General from granting asylum under that Section to persons resettled elsewhere—not that it required or intended the Attorney General to do so. Pet. App. 11a. Even if, as petitioners suggest, Congress did look more favorably on aliens physically present in the United States (covered by Section 208) than those outside the country (covered by Section 207), all that can be said about that difference on this specific issue is that "Congress intended to permit the Attorney General to decide how best to address the question what weight to attribute to firm resettlement in the asylum process with respect to aliens present in the United States." Pet. App. 12a.

Petitioners' argument based on Section 209(b)(4) (8 U.S.C. 1159(b)(4)) fails for similar reasons. That Section precludes the Attorney General from adjusting, to permanent resident, the status of an alien

who was granted asylum in the United States but was firmly resettled elsewhere. Petitioners argue that Congress could not have meant "to let the Attorney General deny asylum to all firmly resettled refugees, [because] there would be no one to bar from resident status under [Section 209(b)(4)]." Pet. 7. But Congress could well have intended to give the Attorney General discretion to decide whether aliens resettled elsewhere should be granted asylum, even while deciding itself that those aliens, even if granted asylum, should not be made permanent residents. Section 209(b)(4) simply says nothing about the exercise of the Attorney General's discretion to grant asylum under Section 208.

3. The regulation is a reasonable exercise of the Attorney General's discretion. It is entirely appropriate for the Attorney General to conclude that only those aliens who have not reached a safe haven elsewhere, and who therefore most legitimately need asylum, should obtain asylum here. Indeed, firm resettlement is an established concept that has long been recognized as an appropriate factor to be considered in the assessment of a refugee's entitlement to asylum in the United States. See *Rosenberg* v. *Yee Chien Woo*, 402 U.S. 49, 54, 56 (1971). In holding there that the INS, in allocating immigration preferences, properly considered whether an alien who claimed to have "fled" a Communist country was firmly resettled elsewhere, the Court observed:

> Far from encouraging resettled refugees to leave one secure haven for another, the Act established United States quotas as a percentage—25%—of the refugees absorbed by all other cooperating nations. * * * It was never intended to open the

United States to refugees who had found shelter in another nation and had begun to build new lives.

Id. at 56. Thus, the concept that aliens firmly resettled elsewhere should not receive asylum here has long been an integral part of Congress's refugee legislation and is rationally related to the goal of sheltering only those aliens who are in genuine need of a safe haven. See *id.* at 55-56.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
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Attorney

AUGUST 1996

APPENDIX A

U.S. DEPARTMENT OF JUSTICE
DECISION OF BOARD OF IMMIGRATION APPEALS
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
FALLS CHURCH, VIRGINIA 22041

Date: June 28, 1994

Files: A72 399 329 - San Francisco
A72 399 330
A72 399 331
A72 399 332
A72 399 333
A72 399 334

IN RE: PAO YANG
YING YANG
JIMMY YANG
BAO YANG
SEYAR YANG
PHONESAVANNE YANG

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Donald L. Ungar, Esquire
909 Montgomery Street, Suite 303
San Francisco, California 94133

ON BEHALF OF SERVICE:
Barry J. Pettinato
General Attorney

CHARGE:

ORDER: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] -
In the United States in violation of law (all respondents)

APPLICATION: Asylum

In a decision dated January 28, 1994, an immigration judge found the respondents deportable as charged, denied their requests for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, but granted them withholding of deportation as to Laos under section 243(h) of the Act, 8 U.S.C., § 1253(h), and in the alternative voluntary departure. The respondents have appealed. The respondents have indicated, through counsel, that they do not oppose the Service's motion for summary dismissal of the appeal. The Service's motion will be granted. The appeal will be summarily dismissed.

The regulations provide at 8 C.F.R. § 3.1(d)(1-a)(i)(D) for the summary dismissal of any appeal, or portion of any appeal, in which "the Board is satisfied, from a review of the record, that the appeal lacks an arguable basis in law or fact, *or* that the appeal is filed for an improper purpose, such as to cause unnecessary delay" [emphasis added]. *See* 57 Fed. Reg. 11,570 (April 6, 1992) (to be codified at 8 C.F.R. § 3.1(d)(1-a)). The respondents here do not contest deportability, and they do not dispute the immigration judge's

finding that they were firmly resettled, a fact they conceded at their hearing. Rather, they have presented a claim on appeal concerning the validity of the regulations, which they acknowledge the Board has no authority to review. Accordingly, based upon our review of the instant record, we conclude that the respondents' appeal "involves a finding of fact or a conclusion of law that was conceded by that party at a prior proceeding," and "lacks an arguable basis in law or fact." *See* 8 C.F.R. §§ 3.1(d)(1-a)(i)(B), (D).

We do not consider the case before us controlled by *Padilla-Augustin v. INS*, Nos. 92-70611, 93-70351 (9th Cir. April 21, 1994), because of significant factual differences. Unlike the respondent in *Padilla-Augustin, supra*, the instant respondents are represented by counsel and have received adequate notice of the potential for summary dismissal of their appeal since they were properly served with the Service's Motion for Summary Dismissal of the appeal. Moreover, the respondents have indicated that they do not oppose summary dismissal of the appeal. They admit that they are appealing to the Board solely to avoid a determination that they failed to exhaust their administrative remedies when their case appears before the Court of Appeals.

ORDER: The appeal is summarily dismissed under the provisions of 8 C.F.R. §§ 3.1(d)(1-a)(i)(B), (D).

/s/FRED W. VACCA
FOR THE BOARD

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
SAN FRANCISCO, CALIFORNIA

January 28, 1994

File No.: A 72 399 329-334

IN THE MATTER OF: PAO YANG
YING YANG
JIMMY YANG
BAO YANG
SEYAR YANG
PHONESAVANNE YANG,
RESPONDENTS

IN DEPORTATION PROCEEDINGS

CHARGE: Deportability under Section 241(a)(1)(B) of the Immigration and Nationality Act, remained in the United States for longer period than permitted as a nonimmigrant.

APPLICATIONS: Asylum under Sections 208(a) and 208(c) of the Act; Withholding of deportation as to Laos under Section 243(h) of the Act; Voluntary departure, in lieu of deportation under Section 244(e) of the Act.

ON BEHALF OF RESPONDENT:
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ON BEHALF OF SERVICE:
Barry J. Pettinato, Esq.

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents, Pao Yang and Ying Yang, are adults and are husband and wife, respectively. They are nationals and citizens of Laos. The four other respondents are the four minor children of Pao Yang and Ying Yang. Although these four children were born in France, it appears to the Court that they are in fact citizens of Laos.

Each of the respondents has been charged with deportability under Section 241(a)(1)(B) of the Immigration and Nationality Act on the ground that each respondent has remained in the United States for a longer period than permitted as a nonimmigrant. Through counsel each one of the respondents has conceded that the allegations in the Orders to Show Cause issued against each respondent are true, and that each respondent is deportable as charged. Accordingly, I find that deportability has been established by clear, convincing, and unequivocal evidence as required in *Woodby v. INS*, 385 U.S. 276 (1966). Therefore, I find each respondent to be deportable under Section 241(a)(1)(B) of the Act as charged.

The respondents have applied for several forms of relief from deportation. First, Mr. Pao Yang has applied for asylum under Section 208(a) of the Act.

His five co-respondents are named on his application as derivative beneficiaries of the application under Section 208(c) of the Act. Each of the respondents is also considered to have made a companion application for withholding of deportation as to Laos under Section 243(h) of the Act. Last, each of the respondents has applied for the privilege of voluntary departure, in lieu of deportation, under Section 244(e) of the Act.

I will consider first Mr. Yang's application for asylum under Section 208(a) of the Act. Of necessity, the Court's decision on that application will also be the decision on the applications of his five co-respondents for asylum under Section 208(c) of the Act.

In the course of the hearing conducted on January 28, 1994, and upon review of the applications for asylum, which are part of the

record in these proceedings, counsel for Mr. Yang and his five co-respondents conceded that Mr. Yang and the other respondents are in fact "firmly resettled" in France as that term is used in Section 208.14(c)(2), and Section 208.15 of Title 8 of the Code of Federal Regulations. In these circumstances, the Court is obligated, under Section 208.14(c)(2) of Title 8 of the Code of Federal Regulations, to deny Mr. Yang's application for asylum. If Mr. Yang's application is denied, it follows that the applications of his five co-respondents, under Section 208(c) of the Act, must also be denied.

As to the applications for withholding of deportation as to Laos under Section 243(h) of the Act, the Court notes that the respondents have previously applied for asylum and withholding of deportation before the asylum office of the Immigration and

Naturalization Service. In the course of those proceedings and Immigration and Naturalization Service indicated in a letter of October 2, 1992, that although it was the Service's determination to deny asylum, it was the Service's intent to grant Mr. Yang's application for withholding of deportation as to Laos. This notation appears on page 3 of the letter of October 2, 1992. A copy of the letter is part of Exhibit 3 in Mr. Yang's file in this proceeding.

In the Court's view, the only matter that required some consideration regarding that application for withholding of deportation, was the question whether in fact Mr. Yang and the five co-respondents were or were not citizens of France. The reason, of course, is that if they are citizens of France, withholding of deportation to Laos would not be necessary to them. The Court's concern was created by an affidavit that bears the signature of Mr. Yang and his spouse. This affidavit dated September 15, 1992, is also a part of Exhibit 3 in Mr. Yang's case. This affidavit indicates that Mr. and Ms. Yang at some point became French citizens. During the course of the hearing, Mr. Yang testified that he and his spouse signed this affidavit before any typewriting was placed on the piece of paper that they signed. Mr. Yang does not know how the statement regarding French nationality came to appear in the affidavit, although he does confirm the truth of the other statements on the affidavit.

Accordingly, further evidence was presented to the Court regarding the nationality of this family. First of all, the Court examined the refugee travel documents of Mr. and Ms. Yang. The Court notes that these refugee travel documents have expired, and the originals of these documents indicate that they have not been extended. The Court also notes that the

United States visas that were printed into these refugee document indicates that all four of the young children were included as travelers on these refugee travel documents.

The Court also reviewed a French document entitled a "Fiche Famiale," which is also a part of Exhibit 3 in these proceedings. This document appears to be a type of family registry. It does not indicate that the persons listed thereon are French nationals or citizens. The Court also examined two certificates of refugee status and statelessness issued by the French government to Mr. and Ms. Yang on August 13, 1992, and May 13, 1993 respectively. It appears that these documents verify that Mr. and Ms. Yang remain refugees in France (that is, refugees of Laotian nationality), although the Court does feel that issuance of these documents after the arrival of the respondents in the United States may have been somewhat unusual.

In any event, the weight of the evidence in this case does convince the Court that the respondents in fact are not nationals of France, although it does appear clear to the Court that the respondents were firmly resettled in France.

Accordingly, in these circumstances the Court will grant withholding of deportation to Laos. It does in fact appear that each of the respondents is a Laotian of Hmong ethnicity, and that circumstances in Laos have not changed between the time of the service of the letter of October 1992 and this time, so as to give rise to a different conclusion regarding withholding of deportation.

ORDER

Accordingly, IT IS THE ORDER OF THIS COURT that the application of each one of these respondents for withholding of deportation as to Laos, should be and hereby is granted.

In the event that the Service should seek alternate countries for the respondents to return to, the Court will also make an alternative order of voluntary departure.

Accordingly, IT IS ALTERNATIVELY ORDERED that each one of the respondents be granted the privilege of voluntarily departing the United States, in lieu of deportation, up to and including July 28, 1994.

If the respondents do not depart the United States in accordance with the order of voluntary departure this order of voluntary departure this order of voluntary departure will automatically be converted into an order of deportation to France, the country of firm resettlement.

/s/LAWRENCE N. DICOSTANZO
LAWRENCE N. DICOSTANZO,
Immigration Judge

A 72 399 329-334 January 28, 1994